IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREG PFEIFER and ANDREW DORLEY,

Plaintiffs,

-vs.-

WAWA, INC., RETIREMENT PLANS COMMITTEE OF WAWA, INC., JARED G. CULOTTA, MICHAEL J. ECKHARDT, JAMES MOREY, CATHERINE PULOS, HOWARD B. STOECKEL, DOROTHY SWARTZ, RICHARD D. WOOD, JR. and KEVIN WIGGINS.

Defendants,

and

WAWA, INC. EMPLOYEE STOCK OWNERSHIP PLAN.

Nominal Defendant.

Case No. 16-00497-PD

PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Greg Pfeifer and Andrew Dorley and additional Class Representative Michael DiLoreto, on behalf of themselves and the Class, move this Court for an order preliminarily approving the Settlement Agreement, attached to the Declaration of Daniel Feinberg ("Feinberg Dec.") as Exhibit 1,[1] approving the form and manner of Class notice, and for this Court to schedule a Fairness Hearing for the final approval of the proposed Settlement. The proposed Notice of Class Action Settlement (to which all Parties have agreed) is attached as Ex. 2.

The proposed Settlement includes a payment of $25 million – less Class Counsel's fees and litigation expenses, and incentive payments to the Class Representatives – to the Wawa, Inc. Employee Stock Ownership Plan ("the ESOP" or "the Plan"), which will be allocated among the approximately 2,300 Class Members. Class Members can elect to receive a distribution of their settlement allocations or roll over their settlement allocations to an IRA or another qualified pension plan. If a Class Member does not make an election, his or her settlement allocations will be transferred to the Class Member's account in the Wawa, Inc. 401(k) Plan ("the 401(k) Plan").

The proposed Settlement resolves Plaintiffs' claims arising from the 2015 Plan amendment in which Defendant Wawa, Inc. ("Wawa") purchased 26,497 shares of stock in Class Members' ESOP accounts for $6,940 per share – a total of $180,816,225. Thus, the proposed settlement payment of $25 million is equivalent to an additional payment of over $943 per share to each Class member. As discussed below, the proposed Settlement merits preliminary approval.

[1] All references to "Ex." Are to the Exhibits attached to the Feinberg Declaration. Capitalized terms used herein are defined in the Settlement Agreement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description of the Action and Procedural History

In light of the Court's familiarity with the case, the background facts are stated briefly.

Plaintiffs' claims arise out of the 2015 Plan amendment eliminating Class members' right to continue to hold Wawa stock in their individual ESOP accounts, and the liquidation of the Class members' Wawa stock in September 2015. First, Plaintiffs allege the ESOP's fiduciaries breached their fiduciary duties in implementing the amendment by liquidating the former employees' shares at less than fair market value and furthering the trustees' personal financial interests. Second, Plaintiffs allege that the rights of former employees under the ESOP became fixed when they terminated employment and, as a result, an amendment adopted after their employment ended could not be applied retroactively to take away their right under the Plan to hold Wawa stock until age 68.

B. Discovery

The Parties engaged in significant discovery prior negotiating the proposed Settlement. Although the Court postponed merits discovery (except as to non-parties) until after a ruling on class certification, Plaintiffs completed discovery on issues related to class certification and obtained documents and testimony from Wawa on the merits to the extent that it overlapped with class certification. Defendants also agreed to produce certain merits-related documents and information which Plaintiffs requested in order to be sufficiently informed to conduct settlement negotiations. Discovery related to class certification included document production, the depositions of the three Class Representatives, and the depositions of five witnesses produced by Defendant Wawa as corporate representatives for a Rule 30(b)(6) deposition. In addition, as the Court permitted the Parties to serve document subpoenas on non-parties, Plaintiffs issued

subpoenas for and obtained extensive documents from Defendants' financial and legal advisors on merits-related issues about the 2015 amendment and the valuation of Wawa stock. Finally, utilizing the information produced during discovery and information exchanged as part of settlement discussions, the Parties exchanged expert reports regarding damages prior to the May 2017 mediation. Therefore, Class Counsel had more than sufficient information to thoroughly evaluate both the merits of Plaintiffs' claims and the potential recovery for the Class prior to negotiating the proposed Settlement.

C. The Court's Rulings on Defendants' Motion to Dismiss and Motion for Reconsideration

On October 6, 2016, the Court largely denied Defendants' Motion to Dismiss. ECF No. 58. Defendants then filed a Motion for Reconsideration or, in the Alternative, to Certify Interlocutory Appeal. ECF No. 63. The Court denied Defendants' Motion for Reconsideration on January 1, 2017. ECF No. 84. The Court's rulings provided guidance to the Parties on important legal issues, but many disputed material issues remain to be decided.

D. Mediation

The Parties agreed to use Michael Young, Esq. of JAMS in New York City as a mediator in this action because of Mr. Young's experience in mediating ESOP class actions and other complex litigation. On September 15, 2016, the Parties engaged in an all-day mediation session with Mr. Young. The mediation session was not successful, but provided the Parties a framework for later settlement negotiations.

In order to give the Parties more time to discuss settlement, the Court placed the action on its suspense calendar on April 6, 2017. ECF No. 99. Following the Court's rulings on Defendants' Motion to Dismiss and Motion for Reconsideration, the Parties agreed to conduct another mediation session with Mr. Young on May 8, 2017. The Parties made substantial progress at the

May 2017 mediation session. Following the May 2017 mediation and after several mediations between Defendants and their insurers, the Parties ultimately reached agreement on the terms of a settlement which included, among other terms, that Defendants and their insurers would pay $25 million to settle the claims by Plaintiffs and the Class.

On November 1, 2017, the Parties signed the Agreement in Principle.

E. The Proposed Settlement

The terms of the proposed Settlement are set forth in the Settlement Agreement. Ex. 1. In short, the Settlement Agreement provides for a payment of $25 million, inclusive of payments to the Class, Class Counsel's attorneys' fees and litigation expenses, and incentive awards to the Class Representatives. In addition to the settlement payment, Defendants will pay settlement administration costs and the cost of an independent fiduciary.

Settlement Class

The Settlement Class is the same as the Class definition proposed in Plaintiffs' pending Motion for Class Certification (and previously stipulated to by Defendants):

> All persons who were Terminated Employee Participants in the ESOP as of January 1, 2015 with account balances greater than $5,000.00 and the beneficiaries of such participants and any Alternate Payees whose stock in the ESOP was liquidated pursuant to 2015 Amendment (i.e. Plan Amendment No. 4).
>
> Excluded from the Class are the Defendant Trustees and members of the Defendant Committee and their immediate families; the officers and directors of Defendant Wawa and their immediate families; and legal representatives, successors, heirs, and assigns of any such excluded persons.

See ECF No. 75 (Stipulation to Class Certification) ¶¶ 1-2.

Settlement Amount and Timing of Payment

The Settlement Agreement provides that Defendants and their insurers will pay a total of $25 million into a qualified settlement fund account within forty-five (45) days of preliminary approval.

Upon final approval and the Settlement becoming non-appealable, the Settlement Amount, less approved Class Counsel attorneys' fees and litigation expenses and Class Representative service awards, will be distributed to Class Members' accounts in the Wawa ESOP. Within 30 days of the Net Settlement Amount being transferred to the ESOP, the ESOP plan administrator will allocate the Net Settlement Amount to the Class Members' ESOP accounts pursuant to Class Counsel's proposed formula to be approved by the Court. The proposed allocation formula proposes to allocate the Net Settlement Amount based upon the Class Members' pro rata Wawa stock allocation under the ESOP as of August 2015.

After the Net Settlement Amounts are paid into the Wawa ESOP, the Net Settlement Amount allocated to the Class Members' individual ESOP accounts will be distributed to Class Members based on their online elections or Distribution Election forms submitted to the Plan Administrator. Class Members may elect to receive a distribution or roll over their settlement allocations to an IRA or another qualified retirement plan.

For Class Members who do not make an online election or submit a Distribution Election form, the Plan Administrator will transfer their individual ESOP accounts into the Class Members' accounts in the 401(k) Plan. For Class Members who are no longer participants in the 401(k) Plan, the 401(k) Plan administrator will re-activate or establish new 401(k) accounts for such Class Members for purposes of the Settlement allocation. Each Class Member's settlement allocation will be invested according to his or her investment allocation under the 401(k) Plan. If the Class

Member has not made an investment allocation election, then the Class Member's settlement allocation shall be invested in the 401(k) Plan's default investment.

Mutual Release

The Class Representatives and the Class will release and dismiss with prejudice their claims asserted in the Amended Complaint (ECF No. 20) against Defendants and Defendants' insurers.

Independent Fiduciary

The Settlement is contingent upon an Independent Fiduciary approving the Settlement and the release of claims on behalf of the Wawa ESOP, as required by Department of Labor Class Exemption 2003-39, which is designed to ensure that settlement of fiduciary litigation does not constitute a prohibited transaction. (*See* Prohibited Transaction Class Exemption 2003-39, "Release of Claims and Extensions of Credit in Connection with Litigation," issued December 31, 2003, by the United States Department of Labor, 68 Fed. Reg. 75,632, as amended.) The Court will have the benefit of the Independent Fiduciary's report as it will be available prior to the final approval hearing.

Attorneys' Fees and Costs

Class Counsel will apply for up to 20% of the Settlement Amount (no more than $5 million) as a common fund fee award, and an award of Class Counsel's reasonable costs of litigation up to $150,000. All attorneys' fees and costs approved by the Court will be paid out of the Settlement Amount. Plaintiffs do not have the right to withdraw from the Settlement if the Court awards less than 20% of the Settlement Amount. Defendants will take no position on Class Counsel's fee application.

Incentive Payments

Class Counsel will apply for a service incentive payment of up to $25,000 to each of the three Class Representatives, which shall be paid out of the Settlement Amount. Defendants will take no position on Plaintiffs' incentive payment application.

Notice to the Settlement Class

The Parties have agreed to Dahl Administration, LLC ("Dahl") as the Settlement Administrator who will be responsible for giving notice to the Class in a form approved by the Court. Dahl's credentials are appended as Exhibit 3 to the Feinberg Declaration. Plaintiffs request that the Court approve the form of Class Notice appended as Exhibit 2 to the Feinberg Declaration. The Notice will be delivered by electronic mail or sent by first-class mail no later than ten (10) days after this Court grants preliminary approval of the Settlement.

III. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

A. Standard of Review

Under Federal Rule of Civil Procedure 23(e), the settlement of a class action requires court approval. Fed. R. Civ. P. 23(e)(2). Review of a proposed class action settlement generally proceeds in two stages: (1) preliminary approval and notice to class members of the proposed settlement; and (2) final approval following a fairness hearing in which the Court determines whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

The standard for obtaining preliminary approval of a proposed class action settlement is "far less demanding" than the standard to obtain final approval. *Curiale v. Lenox Grp. Inc.*, No. 07-cv-1432, 2008 WL 4899474, at *9 n.4 (E.D. Pa. Nov. 14, 2008). "In deciding whether to grant preliminary approval, a court determines whether: the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class

representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval." *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 197–98 (E.D. Pa. 2014) (quotation omitted). "[The Court] will also consider whether the negotiations occurred at arm's length, [and] whether there was significant investigation of Plaintiffs' claims…." *Id.* at 198. Under Rule 23, a settlement "falls within the range of possible approval," if there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied. *Mehling v. New York Life Ins.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007).

B. The Court Should Certify the Class Stipulated by the Parties for All Claims

"In addition, where, as here, the Court has not already certified a class, the Court must also determine whether the proposed settlement class satisfies the requirements of Rule 23." *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 439 (E.D. Pa. 2008). "At the preliminary approval stage, the Court may conditionally certify the class for purposes of providing notice." *Id.* Plaintiffs have filed a renewed Motion for Class Certification along with this Motion for Preliminary Approval. Plaintiffs' renewed Motion for Class Certification is incorporated by reference.

As explained below, the proposed Settlement was reached after extensive investigation of Plaintiffs' claims and as the result of arm's-length negotiations. Moreover, the proposed Settlement has every indication of being fair, reasonable, and adequate, and is otherwise devoid of obvious deficiencies. As such, the Court should grant preliminary approval.[2]

[2] The Third Circuit has identified nine factors to guide a district court's final decision to approve a settlement as fair, reasonable, and adequate. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534-535 (3d Cir. 2004) (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)). Those factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the

C. The Settlement Is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Experienced Counsel

"Whether a settlement arises from arm's length negotiations is a key factor in deciding whether to grant preliminary approval." *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. at 198. *See also In re CIGNA Corp. Sec. Litig.*, No. 02–8088, 2007 WL 2071898, at *2 (E.D.Pa. July 13, 2007) (noting that a presumption of fairness exists where parties negotiate at arm's-length, assisted by a mediator); *Gates*, 248 F.R.D. at 439, 444 (stressing the importance of arm's-length negotiations and highlighting the fact that the negotiations included "two full days of mediation"). Here, the Parties held two full days of mediation with an experienced mediator following substantial discovery and motion practice. Prior to any settlement negotiations, Defendants' Motion to Dismiss (ECF No. 31) was fully briefed and, as a result, Plaintiffs' counsel had a thorough understanding of Defendants' arguments and defenses. By the time of the second mediation, Plaintiffs had completed all discovery related to class certification, which included substantial document production and a Rule 30(b)(6) deposition of Wawa as well as the deposition of the Plaintiffs and Proposed Class Representatives. Plaintiffs had also obtained document discovery from all known relevant non-parties. Additionally, Defendants produced additional documents and data related to the merits and the Class's potential recovery. In order to assess the potential value of the claims, Plaintiffs' counsel hired two different experts – one to assess the losses if Plaintiffs' claims to restore Wawa stock to the ESOP accounts succeeded, and a valuation expert to opine as to the correct fair market value that Wawa should have paid to the Class for

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best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Girsh*, 521 F.2d at 157. At the preliminary approval stage, the Court does need not address these factors as "the standard for preliminary approval is far less demanding." *Gates*, 248 F.R.D. at 444 n. 7. Nonetheless, consideration of these factors leads to the conclusion that the proposed Settlement is fair, reasonable, and adequate.

Wawa stock liquidated in September 2015. Therefore, there can be no doubt that the proposed Settlement is the result of good faith, arm's-length negotiations by well-informed and experienced counsel.

D. There Are No Obvious Deficiencies to Cast Doubt on the Proposed Settlement's Fairness

The proposed Settlement provides substantial relief to the Class and has no obvious deficiencies such as preferential treatment to a portion of the Class. The Settlement Cash Payment – $25 million – represents an additional payment of nearly $1,000 per share for the Class members. The Settlement Cash Payment will be allocated on a pro rata basis. *See Mehling*, 246 F.R.D. at 473 fn. 3 (E.D. Pa. 2007) (granting preliminary approval to pension plan class action settlement allocating settlement payment on pro rata basis). Although the potential recovery was higher, Plaintiffs faced many obstacles in litigation. Plaintiffs believe the proposed Settlement is a fair compromise of their claims.

In the opinion of Plaintiffs' counsel, which was supported by two separate consulting experts hired to assist Plaintiffs' counsel in connection with the mediation, the range of possible recoveries was between $0 and approximately $100 million. Feinberg Dec. at ¶ 6. The Class would not be able to recover under both theories – (A) the fair market value of the Wawa stock liquidated in September 2015 and (B) the present value of the right to continue holding Wawa stock until age 68 – because these are alternative claims for recovery. *Id*. In the opinion of Plaintiffs' counsel, the Class was more likely to recover under the former theory, but the latter theory would have resulted in a larger recovery. *Id*. If Plaintiffs prevailed on all of the disputed issues regarding fair market value of Wawa stock, the maximum recovery would have been approximately $50 million. *Id.*

Thus, the proposed Settlement is an excellent result for the Class and discloses no grounds "to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class…." *Mehling*, 246 F.R.D. at 472 (quotation omitted).

III. THE COURT SHOULD RESTORE THE ACTION TO THE ACTIVE CALENDAR, APPROVE THE PROPOSED NOTICE PLAN, APPOINT A SETTLEMENT ADMINISTRATOR AND SET A FAIRNESS HEARING

The Court should restore this action to the active calendar before making substantive rulings on the pending motions for preliminary approval and class certification. "While circumstances may justify removing cases from the active calendar, in the interest of orderly procedure no action should be taken in such cases until they have been restored to the active calendar." *De Tie v. Orange Cty*., 152 F.3d 1109, 1111 fn. 3 (9th Cir. 1998). For example, in *Essex Ins. Co. v. Quick Stop Mart, Inc.*, No. 07-CV-1909, 2009 WL 700879 (E.D. Pa. Mar. 16, 2009), the court placed an insurance coverage action on its suspense calendar pending resolution of the underlying state court case. *Id*. at *3. After the state court action was resolved, the court "directed the Clerk of Court to remove the action from the suspense docket and restore it to the active docket," and then ruled on the plaintiff's motion for summary judgment. *Id*. at **9-10. The Court should likewise restore this action to the active docket prior to ruling on the pending motions.

Pursuant to Federal Rule of Civil Procedure 23(e)(1), the Court "must direct notice in a reasonable manner to all class members who would be bound by [a proposed settlement, voluntary dismissal, or compromise]." Additionally, Rule 23(c) gives the district court discretion as to "appropriate notice" for a class certified under Rule 23(b)(1) or (b)(2). Fed. R. Civ. P. 23(c)(2)(A). In order to satisfy due process concerns, "notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mehling*, 246 F.R.D. at 477 (quotation omitted).

"To meet this standard, notice must inform class members of (1) the nature of the litigation; (2) the settlement's general terms; (3) where complete information can be located; and (4) the time and place of the fairness hearing and that objectors maybe heard." *Id*. (quotation omitted). *See also In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) ("Generally speaking," notice is sufficient if it "enable[s] class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement").

In addition, Rule 23(e) gives the district court discretion as to the manner of the notice. Fed. R. Civ. P. 23(e)(1). It is well-established that notice sent by first class mail to each member of the settlement class "who can be identified through reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974). In recent years, courts have also approved notice by email. *See, e.g., In re CertainTeed Fiber Cement Siding Litig*., 303 F.R.D. 199, 214 (E.D. Pa. 2014); *Saint v. BMW of N. Am., LLC*, No. CIV.A. 12-6105 CCC, 2015 WL 2448846, at *8 (D.N.J. May 21, 2015).

The proposed Class Notice plan is designed to reach the largest number of Settlement Class Members possible. The Notice, which is attached hereto as Exhibit 2, will be sent by email or first-class U.S. mail to each Settlement Class Member more than two months prior to the Fairness Hearing. Because all Settlement Class members had ESOP accounts, the ESOP has last known addresses for them, at least as of the Class Period, and has their Social Security numbers, which can be used to do an address update if Notices are returned as undeliverable.

The Class Notice Plan agreed to by the Parties satisfies all due process considerations and meets the requirements of Fed. R. Civ. P. 23(e). It describes in plain English: (i) the Settlement's terms and operations; (ii) the nature and extent of the released claims; (iii) the procedure and timing

for objecting to the Settlement; and (iv) the date and place for the Fairness Hearing. As such, it should be approved by the Court.

To facilitate the Class Notice Plan, the Parties request that the Court schedule a Fairness Hearing to take place approximately 90 days after issuing its order on this Motion. The Parties further requests that Dahl be appointed to serve as the Settlement Administrator for purposes of effectuating the Class Notice Plan.

IV. CONCLUSION

For the foregoing reasons, the Class Representatives respectfully requests that the Court restore this action to the active docket, grant the Motion and enter the proposed Preliminary Approval Order submitted herewith.

Dated: December 29, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**, to be served on the counsel listed below via the Court's ECF system on December 29, 2017:

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